CHEONG SOOI LOONG, RE

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[BANKRUPTCY NO. 43-133-86]
23 JULY 1992

BANKRUPTCY: *Bankrupt applied to reverse Official Assignee's refusal to sanction his application to Sessions Court to set aside default judgment against him - Judgment was for RM13,213.91 with interest rate at 18% p.a. - Whether failure by Official assignee to reply on time amounted to refusal to sanction - He claimed judgment was irregularly entered for awarding interest rate beyond Court's jurisdiction - Whether applicant entitled to have judgment set aside ex debito justitiae - Whether applicant an aggrieved person as per s. 86 Bankruptcy Act 1967 - Bankruptcy Act, ss. 38(1)(a), 86.*

The bankrupt applied to reverse the Official assignee's refusal to sanction his application to the Kuala Lumpur Sessions Court to set aside the default judgment against him for RM13,213.91 with interest rate at 18% p.a. Claiming the interest was beyond the Court's jurisdiction to award, he sought to have the judgment set aside *ex debito justitiae*.

He moved the application contending that he was an aggrieved person within the meaning of s. 86 of the Bankruptcy Act 1967. The question was whether his application was properly before the Court pursuant to s. 86 of the Act. The further question was whether inspite of the fact the cause of action on which the application was based had passed to the Official Assignee, s. 38(1)(a) of the Act permitted him to move the relevant Sessions Court.

Held:

[1] As the Official assignee's failure to reply the bankrupt's application on time amounted to a refusal to grant the sanction sought, the application was properly before the Court pursuant to s. 86 of the Act.

[2] The Court extended the *ratio* of Mohd. Azmi J in *Re Khoo Kim Hock* to a bankrupt applying to set aside the default judgment. In that case, he held that the requirement of sanction of the Official Assignee under s. 38(1)(a) only applied to a bankrupt's ordinary claims that is maintaining Court action involving third parties. It does not apply to cases where the bankrupt was seeking to challenge, discharge, review, rescind or vary any order made by the Court under its bankruptcy jurisdiction.

[3] Though the cause of action on which the bankrupt's application was based had passed on to the Official Assignee, s. 38(1)(a) allowed him to proceed with the application but with the previous sanction of the Official Assignee.

[4] As long as the application was *bona fide*, not frivolous and has a reasonable chance of success, the fact that that application could be dismissed with costs the payment of which must be met from the assets held for the benefit of the creditors, was not a ground for refusing the application. The Official Assignee has to look after not only the interests of the creditors but that of the bankrupt as well.

[5] As the interests of the creditors as well as the bankrupt must be balanced, the sanction could be conditional on provision of security for the expenses and costs that may become payable in the event the application was successful.

[6] The refusal to sanction the said application by the Official Assignee was reversed, it being conditional upon deposit of RM1,500 with the Official Assignee as security for payment of costs.

[Application allowed with condition.]

Cases referred to:
Re Khoo Kim Bock [1974] 2 MLJ 29 ***(foll)***
Public Bank v. Hara Industries Sdn. Bhd. [1988] 2 MLJ 618 ***(refd)***
Supreme Finance (M) Bhd. v. Khoo ***[1987] 1 MLJ 296 (refd)***
Boaler v. Power & Ors [1910] 2 KB 229 ***(dist)***

Legislation referred to:
Bankruptcy Act 1967, ss. 38(1)(a), 61(b), 86

For the judgment debtor/applicant - Liza Chan; M/s. Liza Chan & Co.
For the judgment creditor/ petitioner - Jenny Ee; M/s. Mah & Din
For Official Assignee Malaysia - Tengku Muzani b. Tengku Mohamed; Asst. Official Assignee

JUDGMENT

VC George J:

This is an application by a bankrupt seeking, in effect, to have reversed what tantamounts to a refusal by the Official Assignee to sanction his applying to the Kuala Lumpur Sessions Court to have the judgment in default against him on which the bankruptcy petition was founded, set aside. The judgment was for RM13,213.91 with interest thereon at 18% p.a. to be calculated from the 30 October 1984 until realisation and RM431 costs. For the bankrupt it is said that the judgment was irregularly entered it being contended that the interest ordered was beyond the jurisdiction of the Court to award and as such the applicant, it is contended, would be entitled to have the judgment set aside *ex debito justitiae.*

Section 38(1)(a) of the Bankruptcy Act 1967 pursuant to which the sanction was sought is as follows:

> 38(1) Where a bankrupt has not obtained his discharge -
>
> (a) the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of any injury to his person) without the previous sanction of the Official Assignee.

The bankrupt invokes s. 86 of the Act in making this application. Section 86 is as follows:

> 86. If the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the Official Assignee, he may apply to the Court, and the Court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just.

The bankrupt contends that he is an aggrieved person within the meaning of s. 86 and says that the Court should reverse the refusal of the Official Assignee to give him the sanction. Now, apparently there had not been an express refusal by the Official Assignee. The bankrupt had written to the Official Assignee seeking the sanction. Inspite of a written reminder the Official Assignee apparently did not give any reply to the application. I accept the suggestion of Counsel for the bankrupt that the Official Assignee not replying to his application within a reasonable period tantamounts to a refusal to grant the sanction sought. Accordingly I accept that the bankrupt's application is properly before the Court pursuant to s. 86 of the Act.

In *Re Khoo Kim Bock* [1974] 2 MLJ 29 Mohd. Azmi J (as he then was) in dealing with the effect of s. 38(1)(a) said:

> The first question for determination is whether the requirement of sanction of the Official Assignee under s. 38(1)(a) applies only to a bankrupt's ordinary claims, that is maintaining Court action involving third parties, or does it extend to all actions including proceedings, as in the present case, where the bankrupt is challenging the very validity of the adjudication order by which he has been adjudged bankrupt. Having considered the provisions of the Bankruptcy Act as a whole and the section itself, it is my considered opinion that the sanction requirement does not apply to cases where the bankrupt is seeking to challenge an order in bankruptcy, or where he is applying to be discharged or where is seeking the Court's discretion to review, rescind or vary any order made by it under its bankruptcy jurisdiction. The exception contained within brackets in s. 38(1)(a) clearly indicates that the section is intended to apply only to actions for recovery of something - either real or personal - which can be turned into assets such as a claim for recovery of property or money due.

I can find no reason why the ratio of that judgment of Mohd. Azmi J (as he then was) should not be extended to a bankrupt applying to set aside the default judgment in which the bankruptcy notice and the petition that followed was based.

The basis of the intended application cannot be said to be frivolous or vexatious. Similar applications were successfully made in *Public Bank v. Hara Industries Sdn. Bhd.* [1988] 2 MLJ 618 and *Supreme Finance (M) Bhd. v. Koo* [1987] 1 MLJ 296.

While it would probably be an uphill task for the bankrupt to satisfactorily explain his allowing the default judgment to be taken and the delay in seeking to apply to set it aside, I could see no reason to hold that the proposed application is not *bona fide* and accordingly why he should not be allowed to move the relevant Sessions Court. Whether the application will be successful is not for this Court to speculate on.

My attention was drawn to *Boaler v. Power & Ors.* [1910] 2 KB 229 where it was held that while the adjudication remains in force the bankrupt may not bring an action to set aside a judgment that had been entered against him even though it was the very judgment on which the bankruptcy notice and the petition that followed was based and even though it was alleged that that judgment had been obtained by fraud. The English Court of Appeal was of the view that the cause of action on which the bankrupt's writ was based had passed on to the trustee in bankruptcy.

In the instant case it is not suggested by the bankrupt that the cause of action on which his application to set aside the default judgment was based had not passed on to the Official Assignee. He accepts that to be the position but contends, in my judgment correctly, that inspite of that s. 38(1)(a) of the Act allows him to proceed with the application but with the previous sanction of the Official Assignee.

One misgiving the Official Assignee has is that should the bankrupt fail in his application it could be dismissed with costs the payment of which could make inroads into such assets that the bankrupt may have in the hands of the Official Assignee for the benefit of the creditors. *Per se* that is not a ground for refusing the application for sanction. If the bankrupt's intended application is *bona fide* and cannot be said to be frivolous and if it has a reasonable chance of succeeding, then even if it means that the estate of the bankrupt should come out with the expenses of the exercise it seems to me that the Official Assignee is entitled to allow the expenses to be incurred. Section 61(b) of the Act allows the Official Assignee to institute or defend any action or other legal proceeding relating to the property of the bankrupt presumably at the expense of the estate of the bankrupt and as s. 38(1)(b), as has been seen, allows the bankrupt to maintain any action with the previous sanction of the Official Assignee it seems to me that such an action maintained by the bankrupt could also

be at the expense of the bankrupt's estate. The Official Assignee has to look after not only the interest of the creditors but that of the bankrupt as well. However in a proper case balancing the bankrupt's interest and that of the creditors the sanction could be conditional on provision for the expenses and costs.

In the instant case the bankrupt's son has come forward to undertake to meet the expenses of maintaining the proposed application and undertakes to meet any cost that may be payable in the event the application is unsuccessful.

The refusal of the Official Assignee to give the bankrupt his sanction is reversed such reversal being conditional on the deposit within 14 days of the date hereof of RM1,500 with the Official Assignee being the estimated cost that may have to be paid out by the bankrupt applicant in the event his application proves unsuccessful the deposit to be held as security for the payment of any such costs.

Also found at [1992] 4 CLJ 2063